No. 77-39

In the Supreme Court of the United States

OCTOBER TERM, 1977

WILLIAM PINKUS d/b/a "ROSSLYN NEWS COMPANY" and "KAMERA," PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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CITATIONS

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 2a-19a) is reported at 551 F. 2d 1155.

JURISDICTION

The judgment of the court of appeals was entered on April 7, 1977. A petition for rehearing was denied on June 6, 1977 (Pet. App. 1a). The petition for a writ of certiorari was filed on July 6, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, in an obscenity prosecution, the district court erred in instructing the jury that it should determine

the "average person" in the community by considering the "community as a whole," including the "sensitive and the insensitive" and the "young and old, * * * men, women and children * * *."

2. Whether, in the circumstances of this case, the district court erred in instructing the jury that, to be found obscene, material must appeal to the prurient interest of the "average person, or a member of a deviant sexual group * * *."

3. Whether the evidence justified the district court's jury instruction on pandering.

4. Whether the court of appeals abused its discretion under the concurrent sentence doctrine by refusing to review the district court's exclusion of comparison evidence that related to only one count, where petitioner had been sentenced to identical concurrent terms of imprisonment on all 11 counts.

STATEMENT

After a jury trial in the United States District Court for the Central District of California, petitioner was convicted on 11 counts of mailing obscene material, in violation of 18 U.S.C. 1461.[1] Petitioner was sentenced to concurrent terms of four years' imprisonment and a

[1]This was petitioner's second conviction for the same offense. Petitioner's first trial was reversed by the court of appeals because the jury had been charged on the issue of obscenity under the *Miller* (*Miller* v. *California*, 413 U.S. 15) standard rather than under the *Roth-Memoirs* (*Roth* v. *United States*, 354 U.S. 476; *Memoirs* v. *Massachusetts*, 383 U.S. 413) standard, even though his alleged commission of the offense preceded this Court's decision in *Miller*. See *Marks* v. *United States*, 430 U.S. 188. At his second trial petitioner was convicted under the *Roth-Memoirs* standard.

$5,000 fine on each count. The court of appeals affirmed (Pet. App. 2a-19a).

1. The evidence showed that petitioner distributed 11 sexually explicit items through the mails, specifically, advertisements, brochures, a magazine and a motion picture film depicting scenes of sadobondage, oral sex, group sex, bestiality, use of artificial devices and masturbation. The parties stipulated that petitioner voluntarily mailed the materials with knowledge of their contents and with the intention that the materials be for the personal use of the recipients (Tr. 134-141).

Petitioner called four witnesses who testified concerning community standards and the prurient appeal and socially redeeming value of the materials. He also sought to introduce two films, "Deep Throat" and "The Devil in Miss Jones," as comparison evidence on the issue of contemporary community standards (Tr. 170). After viewing the films, the district court refused to admit them into evidence because the defense had not laid an adequate foundation for the films and because it would not have been proper for the jury to view them (Tr. 171, 693). However, the court did permit petitioner to introduce evidence showing the box office gross receipts of the two motion pictures (Tr. 294-297, 301).

On rebuttal, the government presented an expert in the fields of family counseling and human sexuality, who testified that the materials distributed by petitioner would appeal to the prurient interest of the average person as well as to members of specific deviant sexual groups (Tr. 573-578).

2. The district court charged the jury under the *Roth-Memoirs* obscenity standard, instructing it that to determine whether the dominant theme of the materials, taken as a whole, appealed to a prurient interest of the

"average person of the community," the jury should consider "the community as a whole," including the "sensitive and the insensitive" and the "young and old. * * * men, women and children * * *" (Tr. 807-808). The court also instructed the jury that it should consider how the materials would impress "the average person, or a member of a deviant sexual group" (*id.* at 807) and that pandering or the method of distribution could be taken into account in determining whether the materials were obscene (Tr. 810).

The court of appeals affirmed petitioner's conviction, finding that the district court's jury instructions, taken as a whole, were proper (Pet. App. 4a-11a).[2] The appellate court also viewed the two movie films that petitioner had sought to introduce at trial and concluded that they resembled only the film "No. 613," the mailing of which formed the basis for count 9 of the indictment, rather than any of the printed materials mailed by petitioner. Therefore, the court invoked the concurrent sentence doctrine to pretermit review of the comparison evidence issue, concluding that even if the trial judge's exclusion of the evidence had been erroneous, the error would relate only to one of the 11 counts on which petitioner was convicted (*id.* at 14a).

ARGUMENT

1. Petitioner contends that several portions of the district court's charge to the jury were erroneous. The

[2]Although the court of appeals stated that it disapproved of the mention of children in an obscenity charge if children were not involved in the case, it held that the reference here did not constitute reversible error because of other curative aspects of the instructions to the jury (Pet. App. 5a-6a).

court of appeals correctly rejected each of these claims in a thorough opinion on which we rely.

a. Petitioner's first two arguments concern the district court's definition of the "average person" in the community. The court instructed the jury (Tr. 807-808):

> Thus the brochures, magazines and films are not to be judged on the basis of your personal opinion. Nor are they to be judged by their effect on a particularly sensitive or insensitive person or group in the community. You are to judge these materials by the standard of the hypothetical average person in the community, but in determining this average standard you must include the sensitive and the insensitive, in other words, you must include everyone in the community.
>
> * * * As stated before, the test is how the average person of the community as a whole, that being the Central Judicial District of California, would have viewed the material at the time it was mailed.
>
> In determining community standards, you are to consider the community as a whole, young and old, educated and uneducated, the religious and the irreligious, men, women and children, from all walks of life.
>
> If the predominant appeal of the pictures in question here, taken as a whole is an appeal to the normal interest in sex of the average person, the jury should acquit the accused.

Petitioner claims it was error to include references to children or "sensitive" persons in the court's elaboration upon the composition of the community. As this Court has frequently held, however, "jury instructions are to be judged as a whole, rather than by picking isolated phrases from them." *Hamling* v. *United States*, 418 U.S. 87, 107-108. See also *United States* v. *Park*, 421 U.S. 658,

674-675. When read in its entirety, the charge in this case gave no unfair emphasis to any segment of society, but rather set out for the jury's consideration the entire spectrum of society from which the "average person" should be determined.

For example, the trial court specifically advised the jury that the materials should not be judged by their effect on a particularly sensitive member of the community (Tr. 807). Likewise, the court merely stressed the obvious in remarking (*id.* at 808) that the community was comprised both of the "young and old, * * * men, women and children * * *," an instruction that cannot reasonably be construed to reduce the community standard to the level of a child or to give undue weight to the fact that children are part of the community. See *United States* v. *Manarite*, 448 F. 2d 583, 592 (C.A. 2), certiorari denied, 404 U.S. 947. Compare *Butler* v. *Michigan*, 352 U.S. 380, 383, where a Michigan statute that censored any book having a potentially deleterious effect on youth was held unconstitutional because it expressly reduced "the adult population of Michigan to reading only what is fit for children." The balanced instruction in the present case produced no such effect, since, as the court of appeals observed (Pet. App. 6a; emphasis in original), "[t]he *entire community* was explicitly made the appropriate standard for consideration."[3]

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[3]Petitioner also relies (Pet. 16) on a footnote in *Ginzburg* v. *United States*, 383 U.S. 463, 465, n. 3, in which this Court explained that it was not "to be understood as approving all aspects of the trial judge's exegesis of *Roth*." The district court in *Ginzburg* had stated that the community as a whole contained "children of all ages, psychotics, feeble-minded and other susceptible elements. Just as they cannot set the pace for the adult reader's taste, they cannot be overlooked as part of the community." *Ibid.* This comment lacked the neutrality of the charge in the present case because it emphasized only the young and sensitive elements of the community. Here, by contrast, the instruction gave equal emphasis to the less susceptible segments of society, while reminding the jury that the feelings of neither group were conclusive.

b. Petitioner also alleges error in the following portion of the charge (Tr. 806-807):

> In applying this test [for prurient interest], the question involved is not how the picture now impresses the individual juror, but rather, considering the intended and probable recipients, how the picture would have impressed the average person, or a member of a deviant sexual group at the time they received the picture.

Petitioner contends (Pet. 30-33) that this instruction was improper because there was no evidence that the materials appealed to the prurient interest of a defined deviant group. But, to the contrary, there was testimony of an expert witness that the materials appealed to the prurient interests of "homosexuals, sado-masochists and those interested in group sex" (Pet. App. 19a, n. 7). Furthermore, as this Court noted in *Paris Adult Theatre I* v. *Slaton*, 413 U.S. 49, 56 and n. 6, obscene materials speak for themselves, and there is therefore no need to introduce other evidence to prove that certain exhibits appeal to either the average person or deviant groups.[4]

In any event, *Hamling* v. *United States, supra*, 418 U.S. at 128, specifically held that, even in the absence of testimony expressly suggesting that certain obscene materials had been designed for and primarily disseminated to a specific deviant group, the jury "could consider whether some portions of those materials appealed to a prurient interest of a specifically defined deviant group as well as whether they appealed to the prurient

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[4]In *Slaton* the Court reserved decision only on whether expert testimony may be needed in the case of a "*bizarre* deviant group." 413 U.S. at 56, n. 6 (emphasis added).

interest of the average person." In approving this instruction, the Court noted that it was " 'manifest that the District Court considered that some of the portrayals in the Brochure might be found to have a prurient appeal' to a deviant group" (*ibid.*, quoting *United States* v. *Hamling*, 481 F. 2d 307, 321 (C.A. 9)). Finally, petitioner's contention that this instruction is inconsistent with *Mishkin* v. *New York*, 383 U.S. 502, was also expressly rejected in *Hamling* (418 U.S. at 128-129).

c. Petitioner claims (Pet. 34-39) that the government did not offer sufficient evidence of his method of distribution to warrant the following charge on pandering (Tr. 810):[5]

> Having covered the three elements of obscenity, there is one additional matter that you may consider, and that is the matter of pandering. You must make the decision whether the materials are obscene under the test I have given you. In making this determination you are not limited to the materials themselves. In addition, you may consider the setting in which they are presented. Examples of what you may consider in this regard are such things as: manner of distribution, circumstances of production, sale and advertising. The editorial intent is also relevant. What you are determining here is whether the materials were produced and sold as stock in trade of the business of pandering. Pandering is the business of purveying textual or graphic matter openly advertised to appeal to erotic interest of the customer.

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[5]A pandering charge quite similar to the one given in this case was recently approved by this Court in *Splawn* v. *California*, No. 76-143, decided June 6, 1977. See also *Hamling* v. *United States*, *supra*, 418 U.S. at 130; *Ginzburg* v. *United States*, *supra*, 383 U.S. at 470.

Contrary to petitioner's assertions, this instruction was fully justified by the evidence. The proof at trial included the name, occupation and location of each recipient of the obscene materials, in addition to the stipulation that petitioner intentionally distributed the materials through the mails over a period of 11 months, with knowledge of their contents. The recipients were residents of different states and included a student, a housewife, a minister and a police lieutenant (Tr. 134-141), several of whom desired not to be sent the mailings (see, *e.g.*, G.X. 6). Furthermore, petitioner's advertisements themselves emphasized the sexually explicit nature of the materials and "stimulated the reader to accept them as prurient." *Ginzburg* v. *United States*, *supra*, 383 U.S. at 470. See, *e.g.*, G.X. 2A, 7A. In these circumstances the jury could appropriately consider the evidence of pandering in determining whether the materials were obscene. See *Splawn* v. *California*, No. 76-143, decided June 6, 1977, slip op. 2.

2. Petitioner was convicted on 11 counts of mailing obscene materials, only one of which (count 9) concerned the distribution of a motion picture film, "No. 613." Petitioner contends (Pet. 21-29) that the district court erroneously excluded comparison evidence—the films "Deep Throat" and "The Devil in Miss Jones"—that he sought to introduce in order to show that "No. 613" was not obscene when judged by contemporary community standards and that the court of appeals misapplied the concurrent sentence doctrine in declining to review the lower court's decision. This claim is insubstantial.

Petitioner does not seriously dispute the court of appeals' finding that the comparison evidence rejected by the trial judge related only to the film "No. 613" and bore no resemblance to the obscene materials charged in the other 10 counts of the indictment. Thus, since the

validity of petitioner's conviction on those 10 counts (for which he received sentences concurrent with his sentence on count 9) would not have been disturbed even if the court of appeals held that the comparison evidence had been improperly excluded, this case was a proper occasion for application of the concurrent sentence doctrine, which is a recognized judicial instrument to avoid deciding issues not necessary to the outcome of a case. See *Andresen* v. *Maryland*, 427 U.S. 463, 469, n. 4; *Barnes* v. *United States*, 412 U.S. 837, 848, n. 16.[6]

Although some courts have suggested that the concurrent sentence doctrine should not be invoked where to do so may affect future sentencing under a habitual offender statute or parole eligibility or may be used to impeach testimony at a subsequent trial (see *United States* v. *Tanner*, 471 F. 2d 128 (C.A. 7), certiorari denied, 409 U.S. 949), petitioner has presented none of these considerations here. Rather, he contends only that he may have been prejudiced at trial because the jury may have been less likely to convict him on the other 10 counts if it had acquitted him on the count involving the film "No. 613." This argument, however, is based on wholly unsupported speculation, and its adoption would virtually eliminate the concurrent sentence doctrine.[7]

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[6]Furthermore, the relevance of these two films was questionable, since even "[a] judicial determination that particular matters are not obscene does not necessarily make them relevant to the determination of the obscenity of other materials, much less mandate their admission into evidence." *Hamling* v. *United States*, *supra*, 418 U.S. at 126-127.

[7]We have previously discussed petitioner's allegation of a conflict among the circuits as to the applicability of the concurrent sentence doctrine in our brief in opposition in *Darnell* v. *United States*, No. 76-5804, certiorari denied, 429 U.S. 1104, a copy of which we are serving on petitioner.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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